LIBRARY
SUPREME COURT, U.S.

Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75- 899

UNIVERSITY OF DELAWARE,

Petitioner,

vs.

WILLIAM F. KEEGAN, MICHAEL SZUPPER, THOMAS J. MARDAGA, WILLIAM SCHAUBER, AND DONALD PIEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

JOHN P. SINCLAIR,
POTTER, ANDERSON & CORROON,
350 Delaware Trust Building,
Wilmington, Delaware 19899,
Attorney for Petitioner.

PHILIP B. KURLAND,
ALAN L. UNIKEL,
ROTHSCHILD, BARRY & MYERS,
Two First National Plaza,
Chicago, Illinois 60603,
(312/372-2345),
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement 3

Reasons for Granting the Writ 5

I. The Judgment Below Is of Extraordinarily Widespread Consequence Inasmuch as It Authorizes Every Religious Denomination to Commandeer Facilities for the Conduct of Religious Worship Services at Every Tax Supported Educational Institution 5

II. The Judgment Below Is in Conflict with the Judgments of This Court Not Only in Permitting the Use of State University Premises for Religious Worship Services but in Commanding the Use of Those Premises for That Purpose 6

III. The Judgment Below Is in Conflict with the Announced and Repeatedly Expressed Doctrine of This Court Explicating the Meaning of the Establishment Clause of the First Amendment. (1) The State Action Below Is Solely for a Religious Purpose. (2) The Primary Effect of the Action Is to Enhance Religion. (3) It Involves the State in Excessive Entanglement with Religion 8

IV. The Judgment of the Delaware Supreme Court That the State's Failure to Provide State Premises for Religious Worship Services Constitutes a Violation of the Free Exercise Clause Is Inconsistent with the Judgments and Doctrine of This Court 9

V. Conclusion 11

Appendix A: Opinion of the Supreme Court of Delaware A1

Appendix B: Letter from the Supreme Court of Delaware Granting Rehearing in Part A9

Appendix C: Opinion of the Supreme Court of Delaware A13

Appendix D: Opinion of the Court of Chancery A16
Order of the Court of Chancery A28

Appendix E: Letter from the Court of Chancery Denying Motion for Reargument of Temporary Restraining Order A29

Appendix F: Letter from the Court of Chancery Constituting Original Opinion and Temporary Restraining Order A33

TABLE OF CASES AND OTHER CITATIONS.

Cases.

Braunfeld v. Brown, 366 U. S. 599 (1961) 5, 9

Brusca v. Missouri ex rel. State Board of Education, 322 F. Supp. 275 (E. D. Mo. 1971), aff'd. 405 U. S. 1050 (1972) 10

Committee for Public Education v. Nyquist, 413 U. S. 756 (1973) 7, 8

Cruz v. Beto, 405 U. S. 319 (1972) 10

Engel v. Vitale, 370 U. S. 421 (1962) 6

Epperson v. Arkansas, 393 U. S. 97 (1968) 6

Hunt v. McNair, 413 U. S. 734 (1973) 7

Jackson v. California, 460 F. 2d 282 (9th Cir. 1972) .. 10

Lemon v. Kurtzman, 403 U. S. 602 (1971) 7, 8

Levitt v. Committee for Public Education, 413 U. S. 472 (1973) 7

McCollum v. Board of Education, 333 U. S. 203 (1948) 6
Meek v. Pittenger, 421 U. S. 349 (1975) 7, 8
O'Malley v. Brierly, 477 F. 2d 285 (3d Cir. 1973) 10
School District of Abington Township v. Schempp, 374 U. S. 203 (1963) 6, 8, 10
Shelley v. Kraemer, 334 U. S. 1 (1947) 7
Sherbert v. Verner, 374 U. S. 398 (1963) 9
Tilton v. Richardson, 403 U. S. 72 (1971) 7
Walz v. Tax Commission, 397 U. S. 664 (1970) 8
Zorach v. Clauson, 343 U. S. 306 (1952) 6

Statutes.

United States Constitution, Amendment I .....*Passim*
United States Constitution, Amendment XIV, § 1 3
28 U. S. C. § 1257(3) 2
14 Del. Code c. 51, § 5103 3

Other Citations.

Jacquet, *Yearbook of American and Canadian Churches* (1975) 5
National Commission on the Financing of Post Secondary Education, *Financing Post Secondary Education in the United States* (1973) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-

UNIVERSITY OF DELAWARE,

Petitioner,

vs.

WILLIAM F. KEEGAN, MICHAEL SZUPPER, THOMAS J. MARDAGA, WILLIAM SCHAUBER, AND DONALD PIEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully urges that a writ of certiorari be issued to the Supreme Court of Delaware in the above entitled cause to review and reverse the judgment of that court entered on 12 November 1975.

OPINIONS BELOW.

Most of the opinions below have not been reported. The judgment and opinion on rehearing in the Supreme Court of Delaware, dated 12 November 1975, are set out as Appendix A hereto. A letter from the Supreme Court of Delaware granting

rehearing in part and dated 2 October 1975 is set out as Appendix B hereto. The original decision of the Supreme Court of Delaware, dated 22 August 1975, is set out as Appendix C hereto. The final judgment and opinion in the Court of Chancery of the State of Delaware in and for New Castle County, dated 28 March 1974, is reported at 318 A. 2d 142 (Del. Ch. 1974) and, with the judgment order of 4 April 1974, is set out as Appendix D hereto. A letter from the Court of Chancery continuing the temporary restraining order against petitioner, dated 25 October 1973, is set out as Appendix E hereto. The original opinion and temporary restraining order in the form of a letter from the Court of Chancery, dated 4 October 1973, are set out as Appendix F hereto.

JURISDICTION.

The opinion and judgment of the Supreme Court of the State of Delaware were entered on 12 November 1975. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Would a state university, by providing the regular use of its dormitory facilities for the conduct of religious worship services—here the Roman Catholic Mass, violate the Establishment Clause of the First Amendment?

2. Does a state court which compels a state university to provide the regular use of its dormitories for the conduct of religious worship services violate the Establishment Clause of the First Amendment?

3. Does the refusal of a state university, pursuant to its long-standing rules and the provisions of its charter, to provide facilities for the conduct of religious worship services constitute a violation of the Free Exercise Clause of the First Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." AMENDMENT I, The Constitution of the United States.

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." AMENDMENT XIV, § 1, The Constitution of the United States.

STATEMENT.

The University of Delaware is a state land-grant university located in the City of Newark, Delaware. Among the facilities maintained by the University is a dormitory called Christiana Commons.

The charter of the University, 14 Del. Code c. 51, § 5103, provides: "The University shall never be managed or conducted in the interest of any party, sect or denomination." The policy of the University concerning religious groups and religious services was reiterated in a document, dated 1 October 1971, entitled "University—Campus Ministry Position Paper." Section b thereof provides: "Recognized groups may upon proper registration use space in the Student Center and other buildings for business meetings and social programs but not for worship services."

Despite this longstanding policy adopted pursuant to the University charter, a Roman Catholic priest of the Wilmington Diocese, Father Szupper, on 9 September 1973, undertook to conduct Catholic Mass in the commons room of Christiana Commons. The University notified Father Keegan, the Catholic chaplain, that such activity was inconsistent with the University rules. Father Keegan indicated that he was aware of the University policy but that he and Father Szupper intended, nevertheless, to conduct religious worship services each Sunday morning in the commons room of Christiana Commons. And on 16

September 1973, despite the protests of the University, religious worship services in the form of the Catholic Mass were again held by Father Szupper in Christiana Commons. A second request to cease was issued by the University and rejected by Father Keegan.

On 23 September 1973, the University closed Christiana Commons between 9:00 A. M. and 1:00 P. M. and posted a notice that it was doing so in order to preclude the abuse of the University premises. Thereupon, Father Keegan conducted the religious worship services immediately outside the Christiana Commons. Still another letter of protest was sent by the University, with the same absence of effect.

Thereupon, the University sought an injunction against the use of its premises, including Christiana Commons, by the defendant priests for the conduct of religious worship services. The defendants, joined by the Bishop of the Roman Catholic Diocese of Wilmington, sought a restraining order against interference by the University with the conduct of religious worship services in Christiana Commons.

The Delaware Court of Chancery denied the University's request for an interlocutory injunction and granted the respondents' request for the restraining order. Appendix F. On petition for rehearing, the Court of Chancery adhered to its original position. Appendix E. After a hearing on the permanent injunction, the Court of Chancery held that the use of the state university premises for the conduct of religious worship services did not constitute a violation of the Establishment Clause, but neither did the refusal of the University to make available its premises for the conduct of religious worship services constitute a violation of the Free Exercise Clause. It thereupon granted petitioner's motion for summary judgment and denied respondents' motion for summary judgment. Appendix D.

On appeal to the Supreme Court of Delaware, that court held that the conduct of religious worship services on state

university premises did not violate the Establishment Clause, and that the refusal of the state university to make its facilities available for the conduct of religious worship services did constitute a violation of the Free Exercise Clause. Appendix C. The Supreme Court allowed reargument. Appendix B. On 12 November 1975, the Court adhered to its position in a new opinion on which it entered judgment, again holding that there was no violation of the Establishment Clause in making state university facilities available for religious worship services and that there was a violation of the Free Exercise Clause by the University in declining the use of its facilities for the conduct of religious worship services. It is from the judgment and opinion of 12 November 1975 that this petition for certiorari is sought.

REASONS FOR GRANTING THE WRIT.

I. The Judgment Below Is of Extraordinarily Widespread Consequence Inasmuch as It Authorizes Every Religious Denomination to Commandeer Facilities for the Conduct of Religious Worship Services at Every Tax Supported Educational Institution.

There are 1,410 public institutions of higher learning in the United States with 7,127,544 students. See *National Commission on the Financing of Post Secondary Education, Financing Post Secondary Education in the United States* 15 (1973). There are about 300 religious denominations in the United States. See *Jacquet, Yearbook of American and Canadian Churches* (1975); *Braunfeld* v. *Brown,* 366 U. S. 599, 606 (1961). The judgment below would require every such tax supported institution to supply facilities for religious worship to every such religious denomination or to permit every such religious organization simply to commandeer facilities at such tax supported educational institutions for the conduct of religious worship services. Short of the question of the propriety of prayer and Bible reading in this country's public gram-

mar and high schools, this Court has never addressed a more important question of the meaning of the Religion Clauses of the First Amendment than that which is presented by this case. And it is not irrelevant that this Court has forbidden such prayer and Bible reading as well as religious training courses in the public schools. *Engel* v. *Vitale*, 370 U. S. 421 (1962); *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963).

II. The Judgment Below Is in Conflict with the Judgments of This Court Not Only in Permitting the Use of State University Premises for Religious Worship Services but in Commanding the Use of Those Premises for That Purpose.

Almost from the beginning of the development by this Court of the meaning of the Establishment Clause, it has been made clear that public school premises are not to be used for the conduct of religious education or religious worship services. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The holding in *McCollum* was described in *Epperson* v. *Arkansas*, 393 U. S. 97, 106 (1968): ". . . the Court held that Illinois could not release pupils from class to attend classes of instruction in the school buildings in the religion of their choice. This, it said, would involve the State in using tax-supported property for religious purposes, thereby breaching the 'wall of separation' which, according to Jefferson, the First Amendment was intended to erect between church and state."

The ban on the use of public school facilities for prayer and Bible reading was reiterated in this Court's decisions in *Engel* v. *Vitale*, 370 U. S. 421 (1962), and in *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963). These cases rested on the Establishment Clause.

More recently, this Court has applied the same rule of the Establishment Clause to schools of higher education. The Court

has made it abundantly clear that monies provided by the state and federal governments could not be used for premises in which religious activities, no less religious worship services, would be conducted. *Tilton* v. *Richardson*, 403 U. S. 72 (1971); *Hunt* v. *McNair*, 413 U. S. 734 (1973). See *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 776 (1973).

Nevertheless, and in the face of this clear authority to the contrary, the court below held that, not only may the facilities of the University of Delaware be used for the conduct of religious worship services, but the University was compelled to make those premises available for religious worship services.

Those decisions of this Court which prohibit the states from making funds available to parochial schools, even for non-religious expenditures, must also be read as inconsistent with the judgment of the court below. See, *e.g.*, *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973); *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). It is—or should be—clear from the decisions of this Court cited in this section that a state is precluded by the Establishment Clause from providing monies, goods, services, or facilities for the advancement of religious activities or for the conduct of religious worship services. Nor can a state court judgment validate the unconstitutional action. Indeed, the judgment itself is a violation of the Constitution. *Shelley* v. *Kraemer*, 334 U. S. 1 (1947).

The conflict between the judgment of the court below and the judgments of this Court calls for the grant of certiorari in this case.

III. The Judgment Below Is in Conflict with the Announced and Repeatedly Expressed Doctrine of This Court Explicating the Meaning of the Establishment Clause of the First Amendment. (1) The State Action Below Solely for a Religious Purpose. (2) The Primary Effect of the Action Is to Enhance Religion. (3) It Involves the State in Excessive Entanglement with Religion.

The most recent expression of the controlling principles of the Establishment Clause were set forth in *Meek* v. *Pittenger*, 421 U. S. 349, 358 (1975):

> In judging the constitutionality of the various forms of assistance authorized by Acts 194 and 195, the District Court applied the three-part test that has been clearly stated, if not easily applied, by this Court in recent Establishment Clause cases. See, *e.g.*, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 772-773; *Lemon* v. *Kurtzman*, 403 U. S. 602, 612-613. First, the statute must have a secular legislative purpose. *E.g.*, *Epperson* v. *Arkansas*, 393 U. S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. *E.g.*, *School District of Abington Township* v. *Schempp*, 374 U. S. 203. Third, the statute and its administration must avoid excessive entanglement with religion. *E.g.*, *Walz* v. *Tax Comm'n*, 397 U. S. 664.

The action taken below violates all three standards, although it is clear from the cases in this Court that violation of any one of them calls for invalidation under the Establishment Clause.

It is patent that providing facilities for religious worship has no secular purpose whatsoever but only a religious purpose. It is equally obvious that providing facilities for religious worship advances religion. The potential for excessive entanglement is not so plain, but equally likely. For, if the decision below were sustained, the University and the various churches would be in constant negotiation for determining which spaces within

the University were to be made available to whom and at what times. Clearly some space is better than other space and some times are better than other times, and the potential for conflict is immanent.

Since the judgment below is so clearly in conflict with the pronounced doctrine of this Court as to the meaning of the Establishment Clause, certiorari should issue.

IV. The Judgment of the Delaware Supreme Court That the State's Failure to Provide State Premises for Religious Worship Services Constitutes a Violation of the Free Exercise Clause Is Inconsistent with the Judgments and Doctrine of This Court.

This Court has frequently reiterated the proposition that compulsion by the State is a necessary element in any violation of a Free Exercise Right. There must be compulsion of the individual by the State to act in violation of, or to refrain from acting in accordance with, that individual's religious beliefs. *Braunfeld* v. *Brown*, 366 U. S. 599 (1961); *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). There is, in the refusal of the University of Delaware to afford its facilities for religious worship services, no element of compulsion whatsoever. Every individual possibly affected is free to worship or not as he pleases. The failure to afford state facilities for the conduct of religious worship in no way inhibits the freedom of any student to pursue his religious calling as he wishes.

The court below held that, in the absence of a compelling State interest, the State must afford facilities for religious worship. The argument is that the state university makes available facilities for secular activities and, therefore, that it must equally make available facilities for religious worship services. In essence, the argument of the court below is the argument that has been made and failed in the cases concerned with public support for parochial schools, *supra*, part II, *i.e.*,

if the State supports secular education it must also support religious education. See *Jackson* v. *State of California*, 460 F. 2d 282 (9th Cir. 1972); *Brusca* v. *Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275 (E. D. Mo. 1971), *aff'd*, 405 U. S. 1050 (1972).

Nowhere has this or any other high court, to our knowledge, ruled that a State must provide religious organizations or their adherents the means for carrying on their religious worship services. Insofar as the judgment of the Court below would rest on cases involving prisoners or military personnel, it would rely on cases that are inapposite for two reasons. See *School District of Abington Township* v. *Schempp*, 374 U. S. at 297-98. (Brennan, J.) First, those cases involve persons whom the state is physically preventing from attending services at the church of his choice. No such inhibition exists here. Second, those cases do not command the provision of religious worship facilities, but only preclude the State from discriminating among individuals in affording such amenities to those who are physically precluded by the State from seeking them elsewhere. *Cruz* v. *Beto*, 405 U. S. 319 (1972); *O'Malley* v. *Brierly*, 477 F. 2d 285 (3d Cir. 1973).

V. Conclusion.

For the reasons heretofore set out, this Court should grant the petition for certiorari to review the judgment of the Delaware Supreme Court and it should summarily reverse that judgment to bring it in line with this Court's own decisions.

Respectfully submitted,

JOHN P. SINCLAIR,
POTTER, ANDERSON & CORROON,
350 Delaware Trust Building,
Wilmington, Delaware 19899,
Attorney for Petitioner.

PHILIP B. KURLAND,
ALAN L. UNIKEL,
ROTHSCHILD, BARRY & MYERS,
Two First National Plaza,
Chicago, Illinois 60603,
(312/372-2345),
Of Counsel.

December 19, 1975.

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

WILLIAM F. KEEGAN and MICHAEL SZUPPER, *Defendant-Apppellants,*

THOMAS J. MARDAGA, WILLIAM SCHAUBER and DONALD PIEL, *Intervenors-Appellants,*

vs.

UNIVERSITY OF DELAWARE, *Plaintiff-Appellee.*

Nos. 99 and 111, 1974

On Reargument: October 30, 1975

Decided: November 12, 1975

Before MCNEILLY, *Justice,* QUILLEN, *Chancellor,* and STIFTEL, *President Judge.*

Upon appeal from Court of Chancery, Reversed and remanded.

Arlen B. Mekler of Wise & Mekler, Wilmington, for defendants below, appellants.

James P. Collins of Healy & Collins, Wilmington, for intervening defendants below, appellants.

John P. Sinclair of Potter, Anderson & Corroon, Wilmington, and Philip B. Kurland, Donald E. Egan and Alan L. Unikel of Rothschild, Barry & Myers, Chicago, Illinois, for plaintiff-appellee.

John S. Grady and Thomas Stephen Neuberger of Bader, Dorsey & Kreshtool, Wilmington, and Christopher Hall of San Bernardino, California, for Amicus Curiae.

MCNEILLY, *Justice:*

This is an appeal from a decision of the Court of Chancery granting plaintiff, University of Delaware, summary judgment and a permanent injunction against defendants, priests and intervening University students, prohibiting religious worship services in a commons room of the dormitory in which the students live. The pertinent facts and history of this case are succinctly stated in the Court's opinion, 318 A. 2d 135 (1974). We emphasize, however, that we are dealing with a very particular factual situation involving a University campus dormitory.

The University contends that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, supports and requires the ban of all religious worship services from campus facilities. The priests and students contend that the strict enforcement of the University's policy is an infringement upon the Free Exercise Clause of the First Amendment.[1]

The Vice-Chancellor reasoned that although allowance of services in the University dormitory need not offend the Establishment Clause, the University's policy did not demonstrate a substantial infringement upon the priests and students' right to the free exercise of religion.

As we see the case, there are three issues. First, would the abolition of the present University policy prohibiting religious worship in the campus dormitory run afoul of the prescribed tests for violation of the Establishment Clause of the Federal Constitution? Second, does the University policy constitute a

1. The First Amendment in its pertinent part reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercising thereof; . . ."

legally recognizable burden on the students' Constitutional right to freely exercise their religion? Third, if the students' right to freely exercise their religion is legally burdened, is such burden justified by a compelling State interest?

The matter is now before the Court for decision after full argument and, as to the second issue only, reargument. This opinion constitutes the decision of the Court and supersedes prior opinions.

We concur with the Vice-Chancellor's rationale in concluding that abolition of present University policy towards religious worship in the commons room of the dormitory need not run afoul of the prescribed tests for establishment violations, *i.e.*, would not have an effect that primarily advances religion, would not reflect a sectarian legislative purpose, and would not foster excessive government entanglement with religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973). To allow religious worship groups the same rights and privileges attendant with the use of the commons room of the dormitory as are accorded other group activities could reflect a lawful accommodation. *Zorach* v. *Clauson*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 2d 954 (1954); *Abington School District* v. *Schempp*, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844.

Thus, we hold that the University cannot support its absolute ban of all religious worship on the theory that, without such a ban, University policy allowing all student groups, including religious groups, free access to dormitory common areas would necessarily violate the Establishment Clause. The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral "accommodation" of religion is permitted, *Everson* v. *Board of Education*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), *Zorach* v. *Clausen*, *supra*, while "promotion" and "advancement" of religion are not. *McCollum*

v. *Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), *Abington School District* v. *Schempp*, *supra*. University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in the commons room of their dormitory to exchange ideas and share mutual interests. If any religious group or religion is accommodated or benefited thereby, such accommodation or benefit is purely incidental, and would not, in our judgment, violate the Establishment Clause. *Tilton* v. *Richardson*, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 791 (1971). The commons room is already provided for the benefit of students. It is not a dedication of the space to promote religious interests. Therefore, in regard to the Establishment Clause, we agree with the view taken by the Court of Chancery.

The second issue presents us with more difficulty largely due to the words of degree frequently, and perhaps necessarily, employed by the United States Supreme Court. But it appears to us that the Vice-Chancellor applied the wrong test in the portion of his opinion on the Free Exercise Clause. While it is true that the opinion of the Court in *Sherbert* v. *Verner*, 374 U. S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) noted a "substantial infringement of appellant's First Amendment right", it did not indicate that this finding constituted the legal standard for the appellant's burden. Quite to the contrary, the Court, citing *Braunfield* v. *Brown*, 366 U. S. 599, 607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), quoted the following language at 374 U. S. 404:

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

Similarly, the opinion of the court in *Sherbert*, at 374 U. S. 403, said that, if the State action is to be upheld:

> "it must be either because [it] represents no infringement by the State of [appellant's] constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' NAACP v. Bulton, 371 U. S. 415, 438, 9 L.Ed.2d 405, 421, 83 S.Ct. 328."

Thus, it seems to us that, while the Court in *Sherbert* thought the situation there demonstrated a "substantial infringement" of religious freedom, even an "incidental burden" on the free exercise of religion must be justified by a "compelling state interest". Once the individual demonstrates some Constitutional burden, whether substantial or incidental, direct or indirect, upon his free exercise of religion, the State must show a "substantial interest" sufficient to sustain its acts. *Johnson* v. *Robison,* 415 U. S. 361, 384-386, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Wisconsin* v. *Yoder,* 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Gillette* v. *United States,* 401 U. S. 437, 462, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Sherbert* v. *Verner, supra; Braunfield* v. *Brown, supra.*

We recognize, as the University has argued on reargument, that there is nothing fixed or permanent about catch phrases in the judicial opinions cited above and that such words as "indirect" and "incidental" can refer to the relationship between the state action and its effect on the individual as well as to the severity of the burden on the individual. It is of course necessary to examine each factual situation.

But, if the burden is examined on the facts in this case, one must conclude it rises to a legally recognizable interest on the part of the students. The only activity proscribed by the regulation is worship regardless of whether one considers the proscription a direct or indirect burden on student activity. The commons area is already provided for student use and there is no request here that separate religious facilities be established.

The area in question is a residence hall where students naturally assemble with their friends for many purposes. Religion, at least in part, is historically a communal exercise.

It may be that every class division involving religion would not constitute a burden in the Constitutional sense on the free exercise of religion. *Johnson* v. *Robison, supra.*[2] It may be that this case can be viewed as the mere denial of an economic benefit. Indeed, it can be argued, as it has been, that the question is whether the University must permit the students to worship on University property. But, in terms of religious liberty, the question is better put, in our judgment, from the perspective of the individual student. Can the University prohibit student worship in a common area of a University dormitory which is provided for student use and in which the University permits every other student activity?[3] It is apparent to us that such a regulation impedes the observance of religion in the sense of the *Sherbert* case.

Even in *Johnson* v. *Robison, supra,* where the impact of the statute, denial of veteran education benefits to alternative civilian service conscientious objectors, was less direct on religious exercise than the impact of the regulation here, the Court took care to find the Government's "substantial interest" was sufficient to sustain the challenged legislation. Thus, even there, the Court, for its decision, reached what we have designated the third issue in this case.

---

2. It should be noted, however, that in the Johnson case, 415 U. S. at 385, footnote 19, the Court felt the possible absence of burden was due to the relative benefits the challenged legislation had granted to conscientious objectors.

3. When so phrased the Free Exercise issue here does not run afoul of the statement in Justice Douglas' concurrence in *Sherbert* v. *Verner, supra,* 374 U. S. at 412 that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." This case is also far different from a demand by supporters of religious schools for state financial support. *Brusca* v. *Missouri ex rel. State Board of Education,* 332 F. Supp. 275 (E. D. Mo. E. D. 1971), affirmed 405 U. S. 1050, 92 S. Ct. 1493, 31 L. Ed. 2d 786 (1972).

Counsel have agreed that this case is unique and precise precedents have not been supplied. While we recognize that different considerations may be involved under various Constitutional provisions, the varying nature of the legal proceedings, and varying factual situations, we nonetheless find some support for our views in two cases noted in the briefing and orally argued at re-argument by counsel for amicus curiae. In *Tucker* v. *Texas,* 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946), a freedom of press and religion case, the Supreme Court upheld the right of an ordained minister of Jehovah's Witnesses to distribute religious literature in a village owned by the United States, notwithstanding a request to leave by the manager of the village pursuant to his purported authority by federal regulation and Texas criminal law. The Court noted the village "had the characteristics of a typical American town." The case thus has similarities to the University owned dormitory situation here. Similarly, in *Healy* v. *James,* 408 U. S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972), it was held that a state supported college could not deny official recognition to student groups without justification, for such a denial would abridge the First Amendment rights of individuals to free expression and free association. At the outset, the opinion noted that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." 408 U. S. at 180.

We also note the following language from *Wisconsin* v. *Yoder, supra,* 406 U. S. at 220-221.

> "The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."

We think these conclusions in *Yoder* in regard to right of free exercise are worthy of weight here.

Finally, on the second issue, we do not think the cases of *Stein* v. *Oshinsky*, 348 F. 2d 999 (2d Cir. 1965) and *Hunt* v. *The Board of Education*, 321 F. Supp. 1263 (S. D. W. Va. 1971) dictate a different result than the conclusion we reach here. The Vice-Chancellor was careful to distinguish these cases, and we think he did so correctly. The *Stein* case upheld the prohibition of a voluntary prayer by kindergarten children in a classroom setting. The situation there approached a state sanctioned prayer imposed on children of an impressionable age supported by teacher supervisors. The *Hunt* case, while lacking the coercive situation found in *Stein*, still involved commuting high school students meeting voluntarily in classrooms or other premises of a high school. Neither case involved activity by adult residents of a living complex in common areas generally set aside for the benefit of such residents.

We conclude that the regulation involved here has, in this factual context, both the purpose and the effect of impeding the observance of religion and thus constitutes a legal burden on the students' Constitutional right to freely exercise their religion.

Since the state policy here impedes the observance of religion and acts as a prior restraint upon all religious worship, as opposed to all other activities, and thus constitutes a legal burden upon the students' Constitutional rights, it requires a showing of a compelling state interest for justification. *Sherbert* v. *Verner*, *supra*. We therefore reach the third issue in the case. The State was not called upon to offer justification nor was any shown. The Vice-Chancellor erred in holding that the students had not shown the requisite infringement on their free exercise rights and in not demanding an evidentiary hearing on the issue of justification.[4]

Reversed and remanded for further proceedings consistent with this opinion.

---

4. Since it has not been argued, we express no opinion on whether the worship prohibition can be justified on any basis, including a secular purpose to avoid excessive government entanglement by a State University with religion.

APPENDIX B.

SUPREME COURT OF DELAWARE.

John J. McNeilly, *Associate Justice*

208 Court House, Georgetown, Delaware 19947

Oct. 2, 1975

Arlen B. Mekler, Esq.
Wise, Lindh & Mekler
502 Market Tower
Wilmington, Delaware 19801

James P. Collins, Esq.
Metten, Healy & Collins
1116 King Street
Wilmington, Delaware 19801

John P. Sinclair, Esq.
Potter, Anderson & Corroon
Delaware Trust Building
Wilmington, Delaware 19899

John S. Grady, Esq.
Dorsey & Kreshtool
1102 West Street
Wilmington, Delaware

Re: Keegan v. University of Delaware
Nos. 99 and 111, 1974

Gentlemen:

The matter comes before the Court on a motion for reargument.

The Court's decision of August 22d was three-fold. One, the abolition of the present University policy prohibiting religious

worship on campus facilities did not run afoul of the prescribed tests for violation of the Establishment Clause of the Federal Constitution. Two, the State policy constituted an incidental burden on the students' Constitutional right to freely exercise their religion. Three, the University may continue to maintain the worship ban only if justified by some compelling State interest, a question not considered by the Court below and therefore one requiring remand.

As to the issue of the Establishment Clause, the petitioner misreads our decision when it says the Court establishes a new rule of law that the University must permit its buildings to be used at given times for religious worship purposes. We made no decision which required any preferred use of University facilities for religious purposes. We held that the University cannot support its absolute ban on all religious worship on the theory that, without such a ban, University policy allowing all student groups, including religious groups, free access to campus facilities would necessarily violate the Establishment Clause. The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral "accommodation" of religion is permitted, *Everson* v. *Board of Education*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), *Zorach* v. *Clausen*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1954), while "promotion" and "advancement" of religion are not. *McCollum* v. *Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), *Alington School District* v. *Schempp*, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in campus facilities to exchange ideas and share mutual interests. If any religious group or religion is accommodated or benefited thereby, such accommodation or benefit is purely incidental, and would not, in our judgment, violate the Establishment Clause. *Tilton* v. *Richard-*

son, 403 U. S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 791 (1971). It is not a dedication of the facilities to promote religious interests. Therefore, in regard to the Establishment Clause, we adhere to the view previously taken.

The second issue, however, presents us with more difficulty. In our judgment, the Vice Chancellor applied the wrong test in the portion of his opinion on the Free Exercise Clause. While it is true that the opinion of the Court in *Sherbert* v. *Verner*, 374 U. S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) noted a "substantial infringement of appellant's First Amendment right", it did not indicate that this finding constituted the legal standard for the appellant's burden. Quite to the contrary, the Court, citing *Braunfield* v. *Brown*, 366 U. S. 599, 607, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), quoted the following language at 374 U. S. 404:

> "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

Similarly, the opinion of the Court in *Sherbert*, at 374 U. S. 403, said that, if the State action is to be upheld:

> "it must be either because [it] represents no infringement by the State of [appellant's] constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' NAACP v. Bulton, 371 U.S. 415, 438, 9 L.Ed. 2d 405, 421, 83 S.Ct. 328."

Thus, it seems clear that, while the Court in *Sherbert* thought the situation there demonstrated a "substantial infringement" of religious freedom, even an "incidental burden" on the free exercise of religion must be justified by a "compelling state interest". Once the individual demonstrates some constitutional burden,

whether substantial or incidental, direct or indirect, upon his free exercise of religion, the State must show a "substantial interest" sufficient to sustain its acts. *Johnson* v. *Robison*, 415 U. S. 361, 384-386, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Wisconsin* v. *Yoder*, 406 U. S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Gillette* v. *United States*, 401 U. S. 437, 462, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Sherbert* v. *Verner*, *supra*, *Braunfield* v. *Brown*, *supra*.

The University contends, however, that, even if it is not prohibited by the Establishment Clause from permitting campus facilities to be used for student worship services, the Free Exercise Clause of the First Amendment does not justify the conclusion that the worship ban constitutes any incidental burden on the students' Constitutional rights. It argues that the Constitutional rights of the students do not include any right to the use of State facilities. The motion for reargument cites Justice Douglas' concurrence in *Sherbert* v. *Verner*, *supra* at 374 U. S. 412 and *Brusca* v. *Mo. ex rel. State Board of Education*, 332 F. Supp. 275, 279 (E. D. Mo. 1971), affirmed 405 U. S. 1050, 92 S. Ct. 1493, 31 L. Ed. 2d 786 (1972). We believe reargument should be granted on this issue and we so grant it. Reargument will be limited to this one issue.

In the event counsel wish to file supplemental letters of memoranda they should do so on or before October 15, 1975. An argument date will be scheduled thereafter.

Very truly yours,
/s/ JOHN J. MCNEILLY.

JJMc:E

APPENDIX C.

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

WILLIAM F. KEEGAN and MICHAEL SZUPPER, *Defendants-Appellants,*

THOMAS J. MARDAGA, WILLIAM SCHAUBER and DONALD PIEL, *Intervenors-Appellants,*

vs.

UNIVERSITY OF DELAWARE, *Plaintiff-Appellee.*

Nos. 99 and 111, 1974.

Argued: January 17, 1975

Decided: August 22, 1975

Before MCNEILLY, *Justice,* QUILLEN, *Chancellor,* and STIFTEL, *President Judge.*

Upon appeal from Court of Chancery. Reversed and Remanded.

Arlen B. Mekler of Wise, Lindh & Mekler, Wilmington, for defendants below, appellants.

James P. Collins of Metten, Healy & Collins, Wilmington, for intervening defendants below, appellants.

John P. Sinclair of Potter, Anderson & Corroon, Wilmington, and Philip B. Kurland, Donald E. Egan and Alan L. Unikel of Rothschild, Barry & Myers, Chicago, Illinois, for plaintiff-appellee.

John S. Grady of Bader, Dorsey & Kreshtool, Wilmington, and Christopher Hall of San Bernardino, California, for Amicus Curiae.

MCNEILLY, *Justice:*

This is an appeal from a decision of the Court of Chancery granting plaintiff, University of Delaware, summary judgment and a permanent injunction against defendants, priests and intervening University students, prohibiting religious worship services in a commons room of the dormitory in which the students live. The pertinent facts and history of this case are succinctly stated in the Court's opinion, 318 A. 2d 135 (1974).

The University contends that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, supports and requires the ban of all religious worship services from campus facilities. The priests and students contend that the strict enforcement of the University's policy is an infringement upon the Free Exercise Clause of the First Amendment.[1]

The Vice-Chancellor reasoned that although allowance of services in University facilities need not offend the Establishment Clause, the University's policy did not demonstrate a substantial infringement upon the priests and students' right to the free exercise of religion.

We concur with the Vice-Chancellor's rationale in concluding that abolition of present University policy towards religious worship in campus facilities need not run afoul of the prescribed tests for establishment violations, *i.e.*, would not have an effect that primarily advances religion, would not reflect a sectarian legislative purpose, and would not foster excessive government entanglement with religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 93 S. Ct. 2935, 37 L. Ed. 948 (1973). To allow religious worship groups the same rights and privileges attendant with the use of campus facilities as are accorded other group activities could reflect a

1. The First Amendment in its pertinent part reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercising thereof; . . . ."

lawful accommodation. *Zorach* v. *Clauson*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 2d 954 (1954), *Abington School District* v. *Schempp*, 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 944.

But when a state policy (as here) impedes the observance of religion and acts as a prior restraint upon all religious worship, as opposed to all other activities it constitutes, in this context, an incidental burden upon the students' rights which requires a showing of a compelling state interest for justification. *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, 970 (1963). The State was not called upon to offer justification nor was any shown. The Vice-Chancellor erred in holding that the students had not shown the requisite infringement on their free exercise rights and in not demanding an evidentiary hearing on the issue of justification.[2]

Reversed and remanded for further proceedings consistent with this opinion.

---

2. Since it has not been argued, we express no opinion on whether the worship prohibition can be justified by a secular purpose to avoid excessive government entanglement by a State University with religion.

APPENDIX D.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE.
In and for New Castle County.

UNIVERSITY OF DELAWARE,
Plaintiff,
vs.
WILLIAM F. KEEGAN and MICHAEL SZUPPER,
Defendants,
and
THOMAS J. MARDAGA, WILLIAM SCHAUBER and DONALD PIEL,
Intervenors.

Civil Action
No. 4300

March 28, 1974.

John P. Sinclair of Potter, Anderson & Corroon of Wilmington and Philip B. Kurland and Donald E. Egan of Rothschild, Barry & Myers of Chicago, Illinois for plaintiff.

Arlen B. Mekler of Lindh, Mekler & Evans of Wilmington for defendants William F. Keegan and Michael Szupper.

James P. Collins of Metten, Healey and Collins of Wilmington for intervenors Thomas J. Mardaga, William Schauber and Donald Piel.

Joseph A. Rosenthal of Cohen, Morris & Rosenthal of Wilmington for American Civil Liberties Union, amicus curiae.

MARVEL, *Vice Chancellor:* The University of Delaware, plaintiff in this action, seeks a permanent order enjoining the holding of worship services on University property as now sanctioned and/or participated in by the several defendants and others of the Roman Catholic faith, all of whom are involved

in an effort to obtain Court approval of the holding of worship services on University property. Such services are presently being conducted, without the consent of the plaintiff, on Sunday mornings between the hours of 10:30 a.m. and 12:00 noon in a University residential building under the terms of a preliminary order which restrains plaintiff from interfering with the holding of such services. Such order was entered by this Court on October 5, 1973 on defendant's application. Plaintiff now seeks permanent injunctive relief against the continuation of such services, which relief, if granted, would, of course, result in the dissolution of the Court's October 5, 1973 order.

Plaintiff bases its opposition to the holding of worship services on its property not only on a provision of its charter (14 Del. C. § 5103) which states: "The University shall never be managed or conducted in the interest of any party, sect or denomination," but also and more basically on the reciprocal provisions of the First Amendment to the Constitution of the United States which guarantee that there shall neither be permitted any governmental establishment of religion nor government interference with an individual's right to religious freedom.

To implement the above cited charter provision the University has also adopted certain regulations concerning campus religious activities, including an October 1, 1971 directive entitled University-Campus Ministry Position Paper which provides in part as follows:

> "b. *Use of Space*
>
> Recognized [religious] groups may upon proper registration use space in the Student Center and other buildings for business meetings and social programs but not for worship services."

Defendants challenge the constitutionality of this directive as applied to them, reliance for the merits of their position also being placed on the provisions of the First Amendment. The case is now before the Court for decision on the pending cross motions for summary judgment, there being no material facts in dispute.

Plaintiff, which originated as a Presbyterian school in the eighteenth century, was chartered as a college by the State of Delaware in 1833 under the name Newark College. Its name was changed to Delaware College in 1843, and it later qualified as a land grant college. In 1921, plaintiff became a university, and is at present subsidized by public funds appropriated by the Legislature. There is accordingly no doubt but that it is a public institution and thus "* * * an agency of the State of Delaware under the common law and under the constitutional test required by the Fourteenth Amendment. The actions of the Trustees must be judged in that light", *Parker* v. *University of Delaware*, 31 Del. Ch. 381, 75 A. 2d 255.

Plaintiff now owns and maintains extensive educational and auxiliary facilities in and about the City of Newark, including more than forty buildings in which students reside, two of which are highrise apartment houses known as the Christiana Towers. These facilities contain furnished apartments, each of which is designed to house from two to four students for terms of up to twelve months. An area designated as the Christiana Commons, which contains mail boxes, recreational facilities, including a lounge area and other rooms for the use of student residents of the Towers and their guests, is located between the high-rise residential towers of the buildings.

Although there are numerous off campus churches and chapels in and about the City of Newark in which religious services, including those of the Roman Catholic faith, are regularly conducted, early in the 1973 academic term of the University several Roman Catholic students residing in the Christiana Towers requested that worship services of their faith be held in a common room of their dormitory, such request apparently being initially addressed to the defendant Michael Szupper, a Roman Catholic priest as well as a University chaplain.[1] In response to such request, on September 9, 1973,

1. The University designates certain clergymen to serve as chaplains for students of different faiths. However, such chaplains are not paid by the University, being recognized merely as advisors to those students who are members of their respective denominations.

the defendant William F. Keegan, also a Roman Catholic priest, without obtaining or even seeking permission from the University and in clear violation of University policy, celebrated a Sunday morning Mass for Roman Catholic students in the Christiana Commons. The University, through its Dean of Students, thereupon made it clear to Father Keegan that the holding of worship services on University property violated University policy. Such protest, however, was ignored and after other unsuccessful efforts to prevent the continuation of such services, including the locking of the Commons, (which resulted in the holding of Roman Catholic religious service in an area adjoining Christiana Towers), filed this action for injunctive relief against the holding of Roman Catholic worship services on University property.

On September 28, 1973, this Court denied the University's motion for a preliminary injunction. The defendants were thereafter joined by Thomas J. Mardaga, Roman Catholic Bishop of Wilmington as an intervenor and proceeded to file a counterclaim seeking the enjoining of any interference by the University with the conduct of Sunday morning Mass in Christiana Commons. As a result, this Court by order of October 5, 1973 restrained plaintiff "* * * from barring defendants from entering the common room of the Christiana dormitory building of the University of Delaware for the purpose of celebrating Mass on Sundays between the hours of 10:30 a.m. and 12:00 noon, until further order of the Court * * *". Such order remains in full force and effect. Since the entry of such order two University students residing in the Christiana Towers have been permitted to intervene as defendants.[2]

The fundamental constitutional question here in issue arises out of the need to balance the equities implicit in the reciprocal

2. The American Civil Liberties Union was also granted leave to enter an appearance as amicus curiae on behalf of the position taken by the defendants. However, it submitted no briefs and did not participate in argument on the pending motions.

provisions of the First Amendment to the Constitution of the United States which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"1 Del. C. p. 47. These constitutional guarantees, of course, apply to action by the State of Delaware and its agent, the plaintiff, as well as to action by the Congress, *Parker* v. *University of Delaware, supra.*

Next, while the parties to this litigation concede that they have been unable to find a precise precedent in support of their respective positions, opposing counsel, relying on the provisions of the First Amendment, reach directly opposite conclusions. Thus, the University contends that the establishment clause of the First Amendment compels it to ban worship services on its property, while the defendants and intervenors argue that the free exercise clause of the same amendment guarantees them the right to hold and/or to participate in the worship services now being held in Christiana Commons of which plaintiff complains.

In the case of *Walz* v. *Tax Commission,* 397 U. S. 664, the majority of the Supreme Court noted the difficulties inherent in balancing the reciprocal rights guaranteed by the First Amendment, the Court stating:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute . . . The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental

> acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

Seeking to adhere to the principle that government must remain neutral in religious matters, the Supreme Court has endeavored over recent years to establish the thin line which separates the establishment clause from the free exercise clause, the Court having noted that "* * * [t]he line between state neutrality to religion and state support of religion is not easy to locate.", *Board of Education* v. *Allen*, 392 U. S. 236. Nevertheless, despite the difficulties inherent in the job of reconciling the two clauses of the First Amendment here in issue, the Supreme Court of the United States has sought to establish certain tests which serve to guide a trial court.

Thus, a policy on plaintiff's part which would foster the holding of religious services on its campus would clearly be an involvement of the state with religion, *Everson* v. *Board of Education*, 330 U. S. 1, *Zorach* v. *Clauson*, 343 U. S. 306, *McGowan* v. *Maryland*, 366 U. S. 420, and *Engel* v. *Vitale*, 370 U. S. 421. In the case of *Abington School District* v. *Schempp*, 374 U. S. 203, however, the Court sought to distinguish between forbidden involvement of the state in religious activities and conduct permitted under the establishment clause, stating:

> "The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Over the past ten years, the above test has been applied to varying situations. See *Board of Education* v. *Allen*, 392 U. S. 236, and *Committee for Public Education* v. *Nyquist*, U. S. Sup. Ct., 37 L. Ed. 2d 948. In the latter case the Court reviewed the elements to be considered as follows:

> "Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion."

I conclude in the present case, one in which state action has consisted of the entry of an order requiring that worship services be permitted to continue on plaintiff's property against its will, that the resolution of the question presented for final decision in this Court must depend on a balancing of the equities inherent in the respective positions taken by the opposing parties viewed in light of the relevant Supreme Court decisions.

First of all, I am satisfied that a policy could be formulated and carried out by the University meeting the constitutional requirements above listed, *Committee for Public Education* v. *Nyquist, supra.* Thus, periodic worship services of the defendants at Christiana Towers could no doubt be administratively scheduled by plaintiff in the common area here in issue in a manner designed not to interfere with the secular activities of the University and in a way designed to provide time and space to other worship groups of other factions. In such an arrangement, all the University could conceivably be deemed to be furnishing is its public facilities for use by members of its community on a disinterested and impartial basis, *Poulous* v. *New Hampshire,* 345 U. S. 395, *Tucker* v. *Texas,* 326 U. S. 517, *Neimotko* v. *Maryland,* 340 U. S. 268, *Kunz* v. *New York,* 340 U. S. 290, and *Fowler* v. *Rhode Island,* 345 U. S. 67, cases which hold that merely because property is maintained by public funds, the use of such facilities for religious services is not necessarily barred by the establishment clause of the First Amendment.

Rather, the First Amendment's establishment clause is concerned with governmental coercion, either subtle or direct,

whether concerned with one religion, any religion, or no religion. As stated by Mr. Justice Black in *Torcaso* v. *Watkins*, 367 U. S. 488;

> "[n]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

And, in *Engle* v. *Vitale*, 370 U. S. 421, the Court stated:

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

In other words, the establishment clause does not require state hostility towards religon in its various forms but rather requires the exercise of neutrality towards religion in any form. *Abington School District* v. *Schempp, supra.*

Obviously, the University may not constitutionally countenance the celebration of Mass on its property to the exclusion of religious services for students of other faiths. Thus, plaintiff could conceivably avoid conflict with the establishment clause by allowing all groups requesting use of University facilities to have equal access thereto. However, the point here is that the plaintiff is opposed to all worship services on its property, the result being that the question to be answered here is whether or not the Court can insist that defendants' free exercise rights be recognized without running afoul of the prohibition of the establishment clause. And in this regard it is obvious that in the instant case the Court is not concerned either with school children of highly impressionable age or with persons involuntarily incarcerated, *Abington School District* v. *Schempp, supra.*

I conclude that while I am of the opinion that it would be constitutionally possible for the plaintiff to arrange an interspersion of secular and religious activities in the common room of Christiana Towers now being used for worship services by defendants by scheduling similar services of any other petitioning religious group, as well as defendants', and meetings of secular groups, an arrangement which could conceivably be so managed as to meet the test of the Supreme Court and not interfere with the educational scheduling and standards of the University, the point is that plaintiff's policy militates against such an effort, plaintiff, pointing out that the number of religious groups alone which might ultimately seek worship time on plaintiff's property would present an almost impossible scheduling task for the University. However, and finally, on the basis of the above cited cases plaintiff's reliance on its charter[3] as a basis for an absolute ban against the holding of worship services on its property is not well taken.

The point is thus reached at which the plaintiff, having adopted a policy which bans all worship services from its property, the question remaining to be answered is whether or not defendants may insist, despite such ban, that worship services for members of their faith be permitted to be conducted in Christiana Towers by reason of the free exercise clause of the First Amendment, because even though the establishment clause has been here construed so as to permit the use of plaintiff's property for nondiscriminatory religious services, such right is nugatory unless defendants can demonstrate that the banning of worship services on its property by plaintiff violates defendants' free exercise rights.

First of all, the Court is not here dealing with the religious rights of those in military service, those in penal servitude or the holding of emergency services on public property during an

3. "The University shall never be managed or conducted in the interest of any party, sect, or denomination." 14 Del. C. § 5103.

overwhelming disaster, possibilities discussed by Mr. Justice Brennan in his concurring opinion in *Abington School District* v. *Schempp, supra* as follows:

> "Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing free exercise guarantees, provide substitutes where it requires such persons to be. Such a principle might support, for example, the constitutionality of draft exemptions for ministers and divinity students, cf. Selective Draft Law Cases, 245 U.S. 366, 389, 390; of the excusal of children from school on their respective religious holidays; and of the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of disaster or emergency."

Rather, the defendants appear to base their claims under the free exercise clause not on the claimed inaccessibility to Roman Catholic students residing in Christiana Towers of other places of worship in Newark but rather on a claimed right to easy accessibility to a place of worship selected by them. In other words, the student defendants and others want the convenience of having worship services carried on in what is, for all intents and purposes, their home for up to nine to twelve months of the year rather than in a church building. It must also be recognized that the defendant students in their status as college students living in a residential dormitory are to be distinguished by more than age from the children involved in *Stein* v. *Oshinsky* (C. A. 2), 348 F. 2d 999, and *Hunt* v. *Board of Education of County of Kanawha* (S. D. W. Va.), 321 F. Supp. 1263, cases in which young students were denied the right to pray in their school houses partly because they had ample opportunity for such religious activity in their own homes both before and after their school day.

This does not mean, however, that the University may not impose reasonable restrictions on the use of its property for

religious exercises up to and including their prohibition without infringing on the free exercise rights of defendants and intervenors, or that the University must not demonstrate a good reason for such a negative policy, the critical element in a religious liberty case being assessment of the governmental interest. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development,* 80 Harv. L. Rev. 1381.

The burden imposed on government in order to sustain the principle of absolute freedom of religion was discussed in the case of *Sherbert* v. *Verner,* 374 U. S. 398, in which the Court held that improper restraints had been imposed on the free exercise of appellant's religion, namely that practiced by Seventh Day Adventists, by a denial of unemployment compensation she would otherwise have been entitled to, the Court stating:

> "[i]f the purpose or effect of a law is to impede the observance of one or all religions or to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

Having found that there had been substantial infringement of appellant's First Amendment right to the free exercise of her religion, the Court then set forth the standard which the state must meet to justify such an infringement upon religious freedom.

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest of abuses, endangering paramount interests, give occasion for permissible limitation,' Thomas v. Collins, 323 U.S. 516:"

Therefore, as noted above, in order for this Court to find the University's policy against the holding of any worship service on its property to be unconstitutional the Court must conclude initially, that such absolute prohibition constitutes a substantial infringement of defendants' free exercise rights for which the University is unable to offer a compelling justification.

Having found that by banning all worship services on its property, plaintiff is neither discriminating among religious groups nor abusing its discretionary authority over its property, *McKnight* v. *Board of Public Education*, 365 Pa. 422, 76 A. 2d 207, *Adderly* v. *Florida*, 385 U. S. 39, *Stein* v. *Oshinsky*, *supra*, and *Poulous* v. *New Hampshire*, *supra*, I therefore am of the opinion that to compel the plaintiff to permit Roman Catholic worship services to be celebrated in Christiana Towers merely in order to suit the convenience of the student intervening defendants and others would be unwarranted, it being clear on the present record that Roman Catholic Masses are regularly celebrated in two churches situate in the City of Newark, namely St. John the Baptist on North Chapel Street and the Newman Center on Lovett Street, and while said churches are situate some two miles from Christiana Towers, it is not, in my opinion, a substantial infringement of the rights of the intervening student defendants and others of their faith freely to worship, according to their faith, to expect them to attend Mass at such established churches or others of their choice rather than in the Christiana Towers.

On notice, an order may be presented granting plaintiff's motion for summary judgment and denying that of defendants. Said form of order should also provide for the dissolution of the preliminary injunctive order which presently restrains plaintiff from banning Roman Catholic Sunday morning worship services in Christiana Towers.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
In and for New Castle County

UNIVERSITY OF DELAWARE, *Plaintiff,* vs. WILLIAM F. KEEGAN and MICHAEL SZUPPER, *Defendants,* and THOMAS J. MARDAGA, WILLIAM SCHAUBER and DONALD PIEL, *Intervenors.*	Civil Action No. 4300.

ORDER.

This 4th day of April, 1974,

The parties having fully briefed and argued the motion for summary judgment of plaintiff University of Delaware for a permanent injunction against defendants and intervenors pursuant to plaintiff's policy banning all religious services on plaintiff's property, and

The Court having filed its opinion thereon dated March 28, 1974,

It is hereby ORDERED as follows:

(1) The Court's order dated October 5, 1973 preliminarily restraining and enjoining plaintiff from barring Catholic Sunday morning worship services in Christiana Towers is dissolved.

(2) Plaintiff's motion for summary judgment is granted and defendants and intervenors are permanently enjoined from violating any policy of plaintiff which bans all worship services from its property.

/s/ WILLIAM MARVEL,
Vice Chancellor

APPENDIX E.

COURT OF CHANCERY
of the State of Delaware.

William Marvel
Vice-Chancellor

Court House
Wilmington, Delaware

October 25, 1973.

Arlen B. Mekler, Esquire
502 Market Tower

John P. Sinclair, Esquire
350 Delaware Trust Building

Joseph A. Rosenthal, Esquire
301 Market Tower

James P. Collins, Esquire
1116 King Street

Re: *University of Delaware* v. *William F. Keegan and Michael Szupper*, C. A. No. 4300.

Plaintiff has moved for reargument of the ruling of October 4, 1973[1] which denied defendants' motion for a preliminary injunction but granted a temporary restraining order preventing plaintiff until further order from barring the celebration of Mass by defendants in the common room of the Christiana dormitory building of the University of Delaware on Sundays between the hours of 10:30 a.m. and 12:00 noon.

There is no doubt but that this Court of equity has the authority to preserve by a restraining order the last peaceable, noncontested status of the parties, *Simmons* v. *Steiner*, 34 Del. Ch. 593, 108 A. 2d 173, and in its opinion of October 4 the

1. Because an order was entered on such opinion on October 5, I shall proceed to consider plaintiff's pending motion as one to vacate such order.

Court sought to balance the opposing claims of the parties as equitably as possible, weighing the countervailing burdens and benefits resulting from the granting or withholding of temporary relief and deciding that the benefit which would be accorded defendants by the granting of the relief they sought was not offset by a counterbalancing and overriding injury to plaintiff pending resolution of the constitutional issues at stake. Significantly, in so deciding, the Court restricted the conducting of religious services of defendants to a narrow time period and at at specific location.

The Court believes that such conditions impose a minimum of interference with the respective tenets of the opposing parties, a result in which admittedly the claimed constitutional right of religious freedom was temporarily at least placed over alleged property rights. See Annotation, Jurisdiction of equity to protect personal rights; modern view, 175 A. L. R. 438 at § 18.

However, plaintiff argues that defendants' case rests solely upon their conception of what their first amendment rights under free exercise clause should be, which, it is claimed, is unsupported by a single case in point.

In response to such argument the Court notes that plaintiff for its part has failed to cite any case squarely on point. Thus, plaintiff's almost total reliance on *Hunt* v. *Board of Education* (S. D. W. Va.) 321 F. Supp. 1263, would seem misplaced since the circumstances surrounding the pending litigation differ. The cited case involved use of a school house where students spent a portion of their day before returning to their homes in the community. The case at bar, on the other hand, is concerned with a residential dormitory, the students' home throughout the academic year. Moreover, the cited case involved legislative action under which the legislature of West Virginia had removed the school board's specific authority to allow religious activities to be carried on in school houses and limited the authority of boards of education to permitting outside use of school property

solely for meetings or activities of a secular nature. In the case at bar, on the other hand, however, the applicability of 14 Del. Chap. 51 to the action complained of by plaintiff is not clear, and Article I, Section 1 of the Delaware Constitution appears to support defendants' position.

Similarly, plaintiffs reliance on the Higher Education Facilities Act of 1963 and *Tilton* v. *Richardson,* 403 U. S. 672 is misplaced inasmuch as it is conceded that the Christiana dormitory was not built with federal funds.

Thus, it would appear that the case at bar, which appears to be one of first impression, will ultimately be determined by a resolution of the question of whether defendants' activities of which plaintiff complains are protected by the free exercise clause or are barred by the establishment clause of the first amendment.

Next, in balancing the equities, the Court, in the absence of a clear precedent, necessarily relied on the general policy expressed by other courts in cases involving the first amendment. Thus, reliance was placed on *Fowler* v. *Rhode Island,* 345 U. S. 67, and *Abington School District* v. *Schempp,* 374 U. S. 203, despite the fact that such cases are not dispositive of the issues at hand, because they express the concern of eminent judges that first amendment rights to the free exercise of religion must be protected. See also *Engel* v. *Vitale,* 370 U. S. 421, and *Sherbert* v. *Verner,* 374 U. S. 398.

In *Abington School District* v. *Schempp,* at 223, Mr. Justice Clark stated: "* * * it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." It is within the realm of possibility that the defendants in this case ultimately will be able to demonstrate that plaintiff's policy against the conducting of religious services on its campus has such an effect.

Finally, I am not persuaded that because defendants' want to celebrate Mass on plaintiff's campus was not a long established practice, that such peaceable action though of short duration should be administratively barred by plaintiff.

Until such time as this case can be fully briefed or until such time as a need for alteration of the temporary injunctive relief granted is demonstrated, the Court's temporary restraining order of October 5, 1973 will remain in effect. Plaintiff's motion for reargument is denied.

Order on notice.

WM/ch

c: Register in Chancery

APPENDIX F.

COURT OF CHANCERY
of the State of Delaware.

William Marvel
Vice-Chancellor

Court House
Wilmington, Delaware

October 4, 1973.

Arlen B. Mekler, Esquire
John P. Sinclair, Esquire
James P. Collins, Esquire
Joseph A. Rosenthal, Esquire
Wilmington, Delaware

Re: *University of Delaware* v. *William F. Keegan and Michael Szupper,* C. A. No. 4300.

On September 28, the University of Delaware applied to this Court for the granting of a preliminary injunction barring defendants, who are Roman Catholic priests, form entering University property for the purpose of celebrating Sunday Mass with University students of their faith.

The Court, however, was not persuaded at such argument that plaintiff could, on final hearing, establish its claimed right absolutely to ban religious services form its property on the basis of the terms of its charter and University policy when such provisions are measured against the constitutional right of all citizens to the free exercise of their religious beliefs, First Amendment to the Constitution of the United States and Article I, Constitution of the State of Delaware.

Accordingly, plaintiff's application for the granting of a preliminary injunction, as prayed for, was denied, the equities having been found to weigh in favor of defendants and their congregation at the stage of the litigation.

On Sunday, September 30, defendants, as had been their wont, entered University property for the purpose of celebrating Mass in the common room of the University's Christiana dormitory but were met with locked doors.

Defendants, by way of counterclaim, now seek the entry of a preliminary injunction, which, if granted, would allow them access to such common room of the Christiana dormitory for the purpose of celebrating Sunday Mass with students of their faith.

At the present juncture of this litigation it must be borne in mind that this is not a case of the State seeking to establish a particular religion, which would clearly be unconstitutional action, but rather the opposite, namely an alleged attempt by an agency of the State to prohibit the free exercise of religion on its property. The question therefore is whether or not the plaintiff University, which is clearly an agency of the State, *Parker* v. *University of Delaware*, 31 Del. Ch. 381, may do this.

The First Amendment to the Constitution of the United States requires that state purposes concerning religious practices neither advance nor inhibit religion, *Arlington School District* v. *Schempp*, 374 U. S. 203, and such court has also consistently held that the barring of religious groups from public property is in itself a violation of the First and Fourteenth amendments, *Fowler* v. *Rhode Island*, 345 U. S. 67.

Here, I believe that pending briefing of the grave constitutional questions raised as a result of the seemingly intransigent positions taken by the present litigants that the interests of justice will be best served not by granting defendants a preliminary injunction, which would indicate a reasonable probability of success on their part after final hearing, but by the entry of a temporary restraining order preserving until further order the status quo as it existed prior to plaintiff's firm decision forcibly to ban religious services sought to be carried on on University property.

Plaintiff will therefore be temporarily restrained from barring defendants from entering the common room of the Christiana dormitory building of the University of Delaware for the purpose of celebrating Mass on Sundays between the hours of 10:30 a.m. and 12:00 noon until further order of the Court, upon defendants posting bond in the amount of $1,000 with surety.

I again suggest that counsel agree on a stipulated statement of facts as well as a brief schedule and that the constitutional questions here raised be made a matter of cross-motions for final summary judgment as contemplated by Rule 65.

An appropriate order may be submitted on notice.

WM/ch

cc: Register in Chancery